agreements that condition carriage of a vendor's programming on particular concessions. Specifically, the Commission must adopt regulations that prevent a multichannel distributor from requiring a programming vendor to provide it with a financial interest in the programming service as a condition of carrying the program service on its system. Section 616(a) prohibits a multichannel distributor from coercing a programming vendor to provide it with exclusive rights as a condition of carriage, from retaliating against such a vendor for failing to provide exclusive rights, or from otherwise engaging in conduct that discriminates on the basis of affiliation of vendors in the selection, terms or conditions for carriage of video programming. In addition, the statute specifies procedures the Commission must adopt for implementation of the above provisions, including expedited review of complaints made by a programming vendor and assessment of appropriate penalties for violation of the carriage agreement rules as well as for the filing of frivolous claims.

56. We seek comment on how best to implement these provisions. First, Section 616(a)(1) of the 1992 Cable Act provides that the Commission must adopt rules to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on the operator's systems. Because the statute does not prohibit multichannel distributors from holding a financial interest in a programming service, we anticipate that it will not always be clear whether an operator has "required" the programming vendor to provide it with a financial interest as a condition of carrying a particular programming service. What factors should determine whether such is the case? Second, Section 616(a)(2) directs the Commission to adopt rules that prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage. What types of activities would constitute indicia of coercion? Also, we ask how the Commission can clearly distinguish between "coercion" and "negotiation", and whether we could conceivably construe certain mutually acceptable arrangements that would otherwise comply with Section 628 as "coercion." Further, the above provision makes clear that exclusive arrangements may exist other than as a condition of carriage. Section 616 thus does not prohibit exclusive arrangements, but we believe that Section 616 must be read together with Section 628(c), which limits certain exclusive arrangements and establishes standards for determining whether exclusive contracts are in the public interest. We seek comment on this interpretation.

57. Third, Section 616(a)(3) provides that the new rules must prevent a multichannel video programming distributor from engaging in conduct that unreasonably restrains the ability of an unaffiliated video programming vendor to compete fairly, by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms or conditions for carriage of video programming. What specific conduct should be considered a violation of this section? We propose that an "unaffiliated video programming vendor" is a video programming vendor or service in which the multichannel distributor does not have an attributable interest, which could be defined by the broadcast attribution criteria of Section 73.3555 of the

Commission's Rules.[67] In addition, we observe that Section 616(a)(3) prohibits multichannel video programming distributors from "discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors." We believe that a practice of discriminating in the context of carriage agreements involves different activities than those discussed with respect to Section 628 regarding programming access, so we seek comment on how we should define "discrimination" in the context of Section 616.[68] Additionally, we believe Section 628(h) is clear with respect to exclusive distribution arrangements; i.e., such agreements entered into on or before June 1, 1990 are grandfathered in areas served by cable, but nullified if the area is not served by cable. With respect to matters other than exclusive programming arrangements, we propose to afford distributors and vendors six months from the date of adoption of these carriage agreement rules to bring their agreements into compliance. We seek comment on these proposals and on any other issues regarding implementation of this provision that commenters may deem relevant.

58. We also seek comment on the procedures to be established for review of complaints, and on the appropriate penalties and remedies to be ordered. Section 616(a)(4) provides for expedited review of any complaints made by a video programming vendor pursuant to this section. Should we follow the same review process as was discussed above with respect to Section 628(d), or should different complaint procedures be adopted? Should carriage agreements be afforded confidential treatment in full, or rather, should we only permit confidential or proprietary information to be redacted? Section 616(a)(5) provides that the Commission must adopt appropriate penalties and remedies for violations of this subsection, including requiring the multichannel video programming distributor to carry the unaffiliated program vendor.[69] What

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[67] For a more detailed discussion of attribution of ownership with respect to the programming access provisions of the 1992 Cable Act, see paragraph 9, supra. We invite comment on the attribution issues and alternatives raised in that discussion as they might apply in this context of carriage agreements. In this regard, we seek comment on whether the broadcast attribution rules will adequately detect de facto transfers of control for cable operators and programming services.

[68] We note that with respect to these carriage agreement rules, the House Report indicates that "the term 'discrimination' is to be distinguished from how that term is used in connection with actions by common carriers subject to title II of the Communications Act." The House Report further provides that the Commission is to define discrimination with respect to the extensive body of law addressing discrimination in normal business practices. House Report at 110. We seek comment on the appropriate interpretation of this language, particularly with respect to developing standards for identifying "discrimination" governed by Sections 616 and 628.

[69] We note that the House Report states that "[t]his legislation provides new FCC remedies and does not amend, and is not intended to amend, existing antitrust laws. All antitrust and other remedies that can be pursued under current law by video programming vendors are unaffected by this section."

procedures should be established for mandatory carriage? We do not intend to require the multichannel distributor to carry the aggrieved programming service indefinitely. How long should mandatory carriage last? We also intend to assess forfeitures against violators. What guidelines should determine forfeiture amounts? Should the Commission also consider ordering remedies other than forfeiture or mandatory carriage, such as establishment of prices, terms and conditions of sale, similar to the remedies specified in Section 628(e)(1), as discussed above? In addition, Section 616(a)(6) provides that the Commission must delineate penalties to be assessed against any person filing a frivolous complaint pursuant to this section. We propose to assess monetary forfeitures for frivolous complaints and we ask for comment on the factors that should determine whether a complaint is frivolous. Likewise, what guidelines should determine forfeiture amounts? Should we base the forfeiture amount on the resources expended by the Commission in considering the claim and by the party defending against the claim?

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

59. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix B. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

B. Ex Parte

60. This is a non-restricted notice and comment rule-making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

61. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 25, 1993, and reply comments on or before February 16, 1993. To file formally in this proceeding, you must file an original plus four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy

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House Report at 111.

of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

D. <u>Ordering Clauses</u>

62. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended.

63. For further information on this proceeding, contact James Coltharp, Mass Media Bureau, (202) 632-6302; Diane Hofbauer, Office of the General Counsel, (202) 632-6990; or Jane Halprin, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

SECTIONS 12 AND 19 OF
THE CABLE TELEVISION CONSUMER PROTECTION AND COMPETITION ACT OF 1992

SEC. 12. REGULATION OF CARRIAGE AGREEMENTS.

Part II of title VI of the Communications Act of 1934 is amended by inserting after section 615 (as added by section 5 of this Act) the following new section:

"SEC. 616. REGULATION OF CARRIAGE AGREEMENTS.

"(a) Regulations.--Within one year after the date of enactment of this section, the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

"(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

"(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

"(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

"(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

"(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

"(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(b) Definition.--As used in this section, the term 'video programming vendor' means a person engaged in the production, creation, or wholesale distribution of video programming for sale.".

APPENDIX A (continued)

SEC. 19. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

Part III of title VI of the Communications Act of 1934 is amended by inserting after section 627 (47 U.S.C. 547) the following new section:

"SEC. 628. DEVELOPMENT OF COMPETITION AND DIVERSITY IN VIDEO PROGRAMMING DISTRIBUTION.

"(a) Purpose.--The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies.

"(b) Prohibition.--It shall be unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, or a satellite broadcast programming vendor to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.

"(c) Regulations Required.--

"(1) Proceeding required.--Within 180 days after the date of enactment of this section, the Commission shall, in order to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market and the continuing development of communications technologies, prescribe regulations to specify particular conduct that is prohibited by subsection (b).

"(2) Minimum contents of regulations.--The regulations to be promulgated under this section shall--

"(A) establish effective safeguards to prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;

"(B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups; except that such a satellite cable programming vendor in which a cable operator has an attributable interest or such a satellite broadcast programming vendor shall not be prohibited from--

"(i) imposing reasonable requirements for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality;

"(ii) establishing different prices, terms, and conditions to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming;

"(iii) establishing different prices, terms, and conditions which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor; or

"(iv) entering into an exclusive contract that is permitted under subparagraph (D);

"(C) prohibit practices, understandings, arrangements, and activities, including exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor or satellite broadcast programming vendor, that prevent a multichannel video programming distributor from obtaining such programming from any satellite cable programming vendor in which a cable operator has an attributable interest or any satellite broadcast programming vendor in which a cable operator has an attributable interest for distribution to persons in areas not served by a cable operator as of the date of enactment of this section; and

"(D) with respect to distribution to persons in areas served by a cable operator, prohibit exclusive contracts for satellite cable programming or satellite broadcast programming between a cable operator and a satellite cable programming vendor in which a cable operator has an attributable interest or a satellite broadcast programming vendor in which a cable operator has an attributable interest, unless the Commission determines (in accordance with paragraph (4)) that such contract is in the public interest.

"(3) Limitations.--

"(A) Geographic limitations.--Nothing in this section shall require any person who is engaged in the national or regional distribution of video programming to make such programming available in any geographic area beyond which such programming has been authorized or licensed for distribution.

"(B) Applicability to satellite retransmissions.--Nothing in this section shall apply (i) to the signal of any broadcast affiliate of a national television network or other television signal that is retransmitted by satellite but that is not satellite broadcast programming, or (ii) to any internal satellite communication of any broadcast network or cable network that is not satellite broadcast programming.

"(4) Public interest determinations on exclusive contracts.--In determining whether an exclusive contract is in the public interest for purposes of paragraph (2)(D), the Commission shall consider each of the following factors with respect to the effect of such contract on the distribution of video programming in areas that are served by a cable operator:

"(A) the effect of such exclusive contract on the development of competition in local and national multichannel video programming distribution markets;

"(B) the effect of such exclusive contract on competition from multichannel video programming distribution technologies other than cable;

"(C) the effect of such exclusive contract on the attraction of capital investment in the production and distribution of new satellite cable programming;

"(D) the effect of such exclusive contract on diversity of programming in the multichannel video programming distribution market; and

"(E) the duration of the exclusive contract.

"(5) Sunset provision.--The prohibition required by paragraph (2)(D) shall cease to be effective 10 years after the date of enactment of this section, unless the Commission finds, in a proceeding conducted during the last year of such 10-year period, that such prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video programming.

"(d) Adjudicatory Proceeding.--Any multichannel video programming distributor aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission.

"(e) Remedies for Violations.--

"(1) Remedies authorized.--Upon completion of such adjudicatory proceeding, the Commission shall have the power to order appropriate remedies, including, if necessary, the power to establish prices, terms, and conditions of sale of programming to the aggrieved multichannel video programming distributor.

"(2) Additional remedies.--The remedies provided in paragraph (1) are in addition to and not in lieu of the remedies available under title V or any other provision of this Act.

"(f) Procedures.--The Commission shall prescribe regulations to implement this section. The Commission's regulations shall--

"(1) provide for an expedited review of any complaints made pursuant to this section;

"(2) establish procedures for the Commission to collect such data, including the right to obtain copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section, as the Commission requires to carry out this section; and

"(3) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

"(g) Reports.--The Commission shall, beginning not later than 18 months after promulgation of the regulations required by subsection (c), annually report to Congress on the status of competition in the market for the delivery of video programming.

"(h) Exemptions for Prior Contracts.--

"(1) In general.--Nothing in this section shall affect any contract that grants exclusive distribution rights to any person with respect to satellite cable programming and that was entered into on or before June 1, 1990, except that the provisions of subsection (c)(2)(C) shall apply for distribution to persons in areas not served by a cable operator.

"(2) Limitation on renewals.--A contract that was entered into on or before June 1, 1990, but that is renewed or extended after the date of enactment of this section shall not be exempt under paragraph (1).

"(i) Definitions.--As used in this section:

"(1) The term 'satellite cable programming' has the meaning provided under section 705 of this Act, except that such term does not include satellite broadcast programming.

"(2) The term 'satellite cable programming vendor' means a person engaged in the production, creation, or wholesale distribution for sale of satellite cable programming, but does not include a satellite broadcast programming vendor.

"(3) The term 'satellite broadcast programming' means broadcast video programming when such programming is retransmitted by satellite and the entity retransmitting such programming is not the broadcaster or an entity performing such retransmission on behalf of and with the specific consent of the broadcaster.

"(4) The term 'satellite broadcast programming vendor' means a fixed service satellite carrier that provides service pursuant to section 119 of title 17, United States Code, with respect to satellite broadcast programming.".

APPENDIX B

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. This action is taken to implement certain provisions of the Cable Television Consumer Protection and Competition Act of 1992.

II. Objectives. The Cable Act of 1992 and the subsequent Commission actions to implement it are intended to set forth a regulatory scheme for cable systems in the area of programming distribution and carriage agreements. Congress adopted the statute to address its concerns regarding the performance of the cable industry in these areas since the 1984 Cable Act was enacted. The program access provisions of this act are intended to (i) promote the public interest by increasing competition and diversity in the multichannel video programming market, (ii) increase the availability of satellite cable and broadcast programming, and (iii) encourage the development of communications technologies. The carriage agreements provision restricts the activities of cable operators and other multichannel programming distributors with respect to programming vendors.

III. Legal basis. Action as proposed for this rule making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992.

IV. Reporting, recordkeeping and other compliance requirements. In order to implement the 1992 Cable Act, we might require that multichannel video distributors and cable operators submit data regarding the prices, conditions, and level of program sales.

V. Federal rules which overlap, duplicate or conflict with this rule. Sherman Act, Clayton Act, and Robinson-Patman Act.

VI. Description, potential impact and number of small entities affected. In order to implement the Cable Television Consumer Protection and Competition Act of 1992, the Commission has proposed to add new rules and modify others. Depending on the extent of such actions, different cable systems may be affected in different ways. For example, certain cable operators or programming distributors may find it necessary to alter pricing or contracting practices as related to programming distribution, while other cable operators or other multichannel video distributors may enjoy increased access to programming.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objective. None.